

STATE OF MICHIGAN
COURT OF APPEALS

UNITED STATES PIPE & FOUNDRY
COMPANY, INC.,

UNPUBLISHED
September 29, 2005

Plaintiff,

v

No. 254402
Chippewa Circuit Court
LC No. 03-006829-CK

UNDERGROUND SPECIALISTS, INC.,

Defendant/Cross-Defendant-
Appellee,

and

GRANGER & ASSOCIATES, INC.,

Defendant/Cross-Plaintiff-
Appellant.

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In this interlocutory appeal, cross-plaintiff Granger & Associates, Inc. (Granger) appeals on leave granted from the circuit court order denying its motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At issue is whether cross-defendant, Underground Specialists, Inc. (USI), is obliged to indemnify Granger against the claims of plaintiff, United States Pipe & Foundry Company, Inc. USI served as general contractor for the installation of a water main in Superior Township. Granger served as engineer for the project. USI's contract with the township contained the following indemnification provision:

The CONTRACTOR [USI] will indemnify and hold harmless the OWNER and the ENGINEER [Granger] and their agents and employees from any and all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the WORK, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom; and is caused in whole or in

part by any negligent or willful act or omission of the CONTRACTOR or SUBCONTRACTOR, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.

Plaintiff manufactured materials for the project, including the gaskets. Near the end of construction, the gaskets failed and had to be replaced. Plaintiff bore the replacement costs, then brought suit against USI and Granger to recover some of that expense, setting forth theories of negligence and unjust enrichment. The complaint alleges that USI was negligent for failing to pressure-test the gasket seals as they were installed, and that Granger was negligent for failing to require such tests. Plaintiff argued that defendants' negligence prevented the early detection of the defective gaskets, resulting in greatly increased replacement costs, and ultimately in an undeserved windfall for USI.

Granger demanded that USI defend and indemnify it against plaintiff's claims pursuant to the indemnification clause in USI's contract. USI refused, prompting Granger to file a cross-claim, then to move summary disposition of that claim pursuant to MCR 2.116(C)(10). The trial court, with little elaboration, granted the motion. We granted leave to appeal, and ordered a stay of the proceedings below.

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Contract interpretation also presents a question of law, which we review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

At issue is whether the facts as pleaded involve "claims, damages, losses and expenses" that are attributable to "injury to or destruction of tangible property including the loss of use resulting therefrom." Granger argues that plaintiff's claim arises out of damage to the water main system, and that this constitutes a tangible property loss. USI insists that the losses stem not from property damage, but from the use of gaskets that were ill suited to the task at hand although not themselves inherently defective. Granger has the better argument.

"The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured." *The Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980). Regardless of how the complaint is worded, the duty exists "so long as the allegations against the insured *even arguably* come within the policy coverage." *Id.* at 142 (emphasis in original).

USI emphasizes that plaintiff's complaint sets forth counts of negligence and unjust enrichment. However, as the trial court stated, "the underlying problem here is personal property damage." According to plaintiff, the consequences of the failure of the gaskets in the instant application included the need to deconstruct then reconstruct a substantial portion of the project in progress, with attendant delay and expense. This constitutes "losses and expenses . . . attributable to . . . injury to or destruction of tangible property including the loss of use resulting therefrom."

The wording of the indemnification provision, covering "all claims, damages, losses and expenses arising out of or resulting from the performance" of the contract, if those losses stem

from “bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom,” caused “in whole or in part by any negligent or willful act or omission” of the contractor or subcontractor, implies broad coverage. The physical components of the water main system can hardly be characterized as other than tangible property. The delays and expenses plaintiff attributes to Granger’s negligent failure to test, or otherwise determine the suitability of, the failed gaskets trigger the indemnification provision.

For these reasons, we reverse the decision below, lift the stay previously imposed, and remand this case to the trial court with instructions to grant summary disposition in favor of Granger on its cross-claim against USI.

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio